78-1024

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1024

JEANNETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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In The

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No.

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EWALD B. NYQUIST, Commissioner of Education of the State of New York and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

STATEMENT AS TO JURISDICTION

This case involves an appeal from an administrative decision of the Appellee, EWALD B. NYQUIST, affirming an administrative decision of the Appellee, BOARD OF EDUCATION OF THE

SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON.

Constitutional questions were raised for the first time on appeal from the decision of the Appellee, NYQUIST, to the Supreme Court of the State of New York. They were not raised at the earliest opportunity nor in accordance with Section 1012(b) of the New York State Civil Practice Law and Rules and Section 71 of the Executive Law.

Appellant claims a denial of due process in that the statute providing for the initial hearing did not require a transcript or findings. In fact, a transcript of the hearing was made and findings were issued by both the Appellee BOARD OF EDUCATION, and the Appellee, NYQUIST.

Appellant also claimed a pecuniary interest on the part of the Appellee BOARD OF EDUCATION although she demonstrated no evidence of same nor is any

conflict of interest shown.

There is no substantial federal question.

STATUTES INVOLVED

New York State Education Law Section 3020-a provides as follows:

§3020-a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within five days, by

a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within fifteen days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by the mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public

or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

The New York State Civil Practice Law and Rules, insofar as applicable to this matter, provides as follows:

"§1012. Intervention as of right; notice to attorney-general where constitutionality in issue.

(b) Notice to attorney-general where contitutionality in issue. When the constitutionality of a statute of the state

is not a party, the court shall notify the attorney-general, who shall be permitted to intervene in support of its constitutionality."

Section 71 of the executive law of the State of New York is as follows:

§71. Attorney-general to appear in cases involving the constistitutionality of an act of the legislature.

Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.

QUESTIONS PRESENTED

1. Where a party in an administra- proceeding chooses to appeal the first administrative decision to a second administrative body, and then appeals to the courts, do the courts consider this as an appeal from the first or second administrative determination?

2. What is the standard of review by the courts of an administrative determination?

3. Can the Appellant challenge the constitutionality of State laws without having drawn in question the federal issues at the earliest opportunity?

4. Can the Appellant challenge the constitutionality of State laws without following the statutory requirements of the State for doing so?

5. If a State law has been held to not contain requirements that would constitute due process, but the Appellant received all of those requirements, is there still a violation of due process?

6. If the decision-making agency has no financial interest in the decision, and there is no evidence of a conflict of interest, can the agency be determined to be partial?

7. Is there a sustantial federal question involved?

STATEMENT OF THE CASE

The Appellant, a tenured school teacher, was charged by William A. Prattella, the full-time, salaried superintendent of schools for the City of Mount Vernon, with the charges and specifications set forth on pages 38 - 40 of the Appellant's Brief.

A three-member panel held a hearing under Section 3020-a of the Education Law of the State of New York. A stenographer was in attendance and a transcript exceeding 500 pages was made of the hearing. The panel recommended dismissal of the charges.

Under section 3020-a the initial decision was made by the nine-member Board of Education. These nine members are part-time, non-salaried and elected. Prattella was appointed by the Board. The Board read the transcript, made a

finding, imposed a penalty and issued a written decision. See p.41 of Appellant's Brief.

The Appellant then chose to appeal this matter to the Appellee NYQUIST, although the Appellant had the right to appeal directly to the Supreme Court of the State of New York, Section 3020-a(5). The Appellee,NYQUIST, reviewed the transcript, heard argument by both counsel, found against the Appellant and issued a written decision affirming the Appellee BOARD OF EDUCATION. See pgs. 42 and 43 of Appellant's Brief.

Appellant then appealed NYQUIST's decision to the New York State Supreme Court and for the first time raised constitutional questions. Appellant never moved the Court to bring in the Attorney General of the State of New York as required by Section 71 of the Executive

Law and Section 1012(b) of the Civil Practice Law and Rules. The Supreme Court dismissed the petition of Appellant.

Thereafter, the Appellate Division modified the decision of the Appellee NYQUIST, but the Court of Appeals reversed the Appellate Division and reinstated the decision of the Supreme Court, the Appellee NYQUIST and the Appellee BOARD OF EDUCATION.

ARGUMENT

Point I

THE NEW YORK STATE COURTS IN THIS CASE REVIEWED THE DECISION OF THE APPELLEE NYQUIST AND NOT THE DECISION OF THE APPELLEE BOARD OF EDUCATION.

When a teacher appeals a decision of a Board of Education to the Commissioner of Education, and thereafter appeals the commissioner's decision to the State Courts, the Courts can review only the commissioner's decision and not that of the local board of education. Matter of Chapin v Board of Education, 291 NY 241. See also Chauvel v Nyquist, 43 NY2d 48.

After the Mount Vernon Board of Education decided against the Appellant, the Appellant had a right to go the the State courts to review the decision of the Board of Education. Section 3020-a(5) of the Education Law of the State of New York. Appellant chose not to exercise this right but to follow the alternate remedy of

appealing to the Commissioner of Education. When the Commissioner found against Appellant, and Appellant then appealed to the State courts, the matter under review by the State courts was the decision of the Appellee NYQUIST and not of the Appellee BOARD OF EDUCATION.

Point II

THE NEW YORK STATE COURTS COULD REVERSE THE DECISION OF THE APPELLEE NYQUIST ONLY IF THE APPELLEE NYQUIST WAS ARBITRARY AND CAPRICIOUS AND MADE A DETERMINATION WHICH HAD NO RATIONAL BASIS

The standard of review by the New York courts of an administrative decision is set forth in Chauvel v Nyquist, supra. The Court stated:

> "Accordingly, the inquiry on this appeal is whether the commissioner's determination supporting the Board of Education and dismissing appellant's appeal was arbitrary and capricious, i.e., whether there was no rational basis for such decision." (At p52)

See also Pell v Board of Education, 34 NY2d 222,and Chapin v Board of Education, supra, where the Court said that the commissioner's decision was final unless shown to be purely arbitrary.

The Appellee NYQUIST read the transcript of the hearing which contains more than 500 pages and listened to the arguments of the attorneys for the Appellant and Appellee, BOARD OF EDUCATION. Appellee NYQUIST issued a two-page decision indicating that the Appellant was negligent "without a doubt", stated that there was testimony regarding her lack of capability and her indifference and hostility towards students. The Court of Appeals of New York State held that the Commissioner's decision was not arbitrary. Accordingly, that decision should stand.

Point III

APPELLANT DID NOT RAISE THE CONSTITUTIONAL QUESTIONS AT THE EARLIEST OPPORTUNITY

It has been held for many years that federal questions must be raised at the lowest level in order for the Supreme Court of the United States to review them, Hulbert v Chicago,202 U.S. 275. When the validity of statutes is in issue, that validity must have been "drawn in question" and the issue must be "specially set up or claimed". Parker v Illinois, 333 U.S. 571, Pennsylvania R. Co. v Illinois Brick Co., 297 U.S. 447, Central Union Co. v Edwardsville, 269 U.S. 190.

The proper procedure to challange Section 3020(a) of the Education Law was followed in Kinsella v the Board of Education, 378 F.Supp. 54, affd. 542 F.2d 1165 (2d Circ. 1976).

The Kinsella case will be discussed in Point V of this Brief with regard to the substance of issues.

Kinsella, a tenured school teacher, had charges brought against him and was scheduled for a hearing under Section 3020-a. Kinsella brought a proceeding in Federal Court against the Board of Education challenging the constitutionality of Section 3020-a on numerous grounds. The federal and constitutional questions were, therefore, specifically set up at the earliest opportunity. Kinsella did not do what the Appellant herein did. The Appellant herein had her hearing without objection, appealed to the Commission of Education and had arguments made before the Commissioner. Only after losing before both administrative agencies did the Appellant herein

raise the constitutional questions. Appellant, therefore, proceeded under Section 3020-a for two stages hoping to win, and only if she lost was she going to question the validity of the statute. The appeal should be dismissed.

Point IV

APPELLANT DID NOT FOLLOW NEW YORK STATE REQUIREMENTS FOR CHALLENGING THE CONSTITUTIONALITY OF A NEW YORK STATE STATUTE

Where a party challenges the constitutionality of a New York State statute, the party should make a motion before a court to give notice to the Attorney General of the State of New York so that the Attorney General may come into the case with regard to the issue of constitutionality, Section 71 of the Executive Law of the State of New York and Section 1012(b) of the Civil Practice Law and Rules of the State of New York.

Appellant failed to follow New York State statutary procedure for challenging the constitutionality of a New York State statute. The Attorney General of the State of New York was given no opportunity to intervene in the case. Accordingly,

the appeal should be dismissed.

Point V

A STENOGRAPHER WAS PRESENT AT THE APPELLANT'S HEARING. A TRANSCRIPT OF OVER 500 PAGES WAS MADE OF THE HEARING. THE APPELLEE BOARD OF EDUCATION AND THE APPELLEE NYQUIST BOTH ISSUED WRITTEN DECISIONS. ACCORDINGLY, THE DEFECTS IN SECTION 3020-a WERE NOT APPLICABLE TO THE APPELLANT.

The main thrust of the Appellant's case is that the Appellant had a hearing under a supposedly unconstitutional statute. In fact, the statute was not held to be entirely unconstitutional. The Federal District Court for the Western District of New York did find that Section 3020-a contained defects in that neither the statute nor the regulations required a transcript of the hearing or written decisions of the deciders of fact, Kinsella v Board of Education, supra.

In the Kinsella case, the plaintiff challenged Section 3020-a on a whole

variety of grounds but was sustained on only the issues of the transcript and written decision. The Court stated:

> "The statute does not require that the school boards'decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desire, order the transcript" (At pgs. 59-60)

The Court went on to note on page 60 of the decision that a written decision was not required by the decider of facts. Accordingly, the Court stated that either legislative action or executive action with regard to rules and regulations was required to cure the two statutory defects.

In the instant case, the defects were not applicable. Although neither the statute or the regulations required a transcript, a transcript was in fact made and sent to the school board which read it. That same transcript was read by the Commissioner of Education's office. Although neither Section 3020-a nor the Rules and Regulations required written decisions, in fact both the school board and Appellee NYQUIST rendered written decisions.

It is absolutely clear that in no way was the Appellant prejudiced. In fact, the claim that the statute was unconstitutional as it applies to Appellant when in fact the Appellant received complete due process is a sham argument. For this Court to reverse would mean that Appellant was to have a new hearing with another transcript and written decisions again issued. Nothing

would be different except that testimony might be altered depending upon the availability of witnesses.

What would happen to all other hearings under that section of law where transcripts were in fact made and written decisions were issued?

Would all of these hearings have to take place again? All that a reversal would accomplish is to give those who are charged a second opportunity to present their case after having lost the first time with due process of law having already been accorded them.

It should be remembered that the appeal to the courts was only an appeal from the decision of the Appellee NYQUIST who had reviewed a transcript of over 500 pages, rendered a decision in writing, and in no way acted in a procedural manner denying due process

to the Appellant. Neither, in fact, did the Board of Education.

Point VI

THERE WAS NO PECUNIARY INTEREST INVOLVED IN THE OUTCOME OF THIS INTEREST BY ANY APPELLEE

The charges against the Appellant were made by a salaried employee of the Appellee BOARD OF EDUCATION. The initial determination was made by nine non-salaried,part-time,elected officials of the local board of education. The second determination was made by a full-time salaried employee of the State of New York. It is exceedingly difficult to ascertain how any of the officials making decisions had a pecuniary interest in the outcome. In no way is this case similar to Tumey v Ohio, 273 U.S. 510, in which the local Judge was paid out of the fines collected on convictions. The case herein does not even approach the fact situation of Ward v Village of Monroeville, 409 U.S. 57. In the Ward

case, the local mayor was also the traffic Judge. Over a four-year period, the fines imposed constituted between 37 per cent and 50 per cent of the entire Village income. The test enunciated in the Ward case should be applied to the situation herein:

> "...whether a situation... would offer a possible temptation to the average man as a judge to forget the burden of proof required..." (At p60.)

The court held in Ward that the mere union of executive power and judicial power is not a violation of due process. The local board of education has legislative power and judicial power but no executive power. There is nothing set forth in the Appellant's Brief to show the pecuniary interest of a board of education in firing a teacher, particularly when they are non-salaried and elected.

Even if, as is not shown herein, a member of the board of education had some prior involvement in the case herein, there would be no violation of due process, Goldberg v Kelly, 397 U.S. 254. See also Richardson v Perales, 402 U.S. 389 and Marcello v Bonds, 349 U.S. 302.

Considering that this case is really an appeal from the decision of Appellee NYQUIST, the question of pecuniary interest or conflict of interest is even more farfetched. In fact the Appellant's argument so strains the facts that she might as well argue that no federal judge could sit on a case involving the United States.

Point VII

THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED HEREIN

Before the Supreme Court of the United States will take an appeal, there must be a substantial federal question, Zucht v King, 260 U.S. 174, Sugarman v United States, 249 U.S. 182, Jacobson v Massachusetts, 197 U.S. 11. The questions involved herein are devoid of merit and in fact are frivolous.

The issue really involved is whether an Appellant who received complete due process in fact is entitled to a second hearing because the statute did not require all of the procedural safe-guards which were in fact accorded to the Appellant. It should be noted that while the Appellant claims that she was tried under an unconstitutional statute, she in no way sets forth what

rights she should have received that she didn't.

With regard to the impartiality of the hearing,there is also a total lack of evidence showing a pecuniary interest or conflict of interest. To upset the decision herein on constitutional grounds would be to render all departmental hearings void, including a hearing by a State Commissioner with regard to a municipal employee.

CONCLUSION

The Appellant has in no way been denied due process of law and the appeal should be dismissed.

Respectfully submitted,

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